

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

**FP HOLDINGS, L.P., d/b/a PALMS CASINO
RESORT**

Employer

and

Case 28-RC-217964

**LOCAL JOINT EXECUTIVE BOARD OF LAS
VEGAS a/w UNITE HERE INTERNATIONAL
UNION**

Petitioner

DECISION AND DIRECTION OF ELECTION

Local Joint Executive Board of Las Vegas a/w UNITE HERE International Union (Petitioner) seeks to represent a unit of all full-time and regular part-time employees employed by FP Holdings, L.P., d/b/a Palms Casino Resort (the Employer)¹ in Las Vegas, Nevada. There are currently approximately 831 employees in the petitioned-for unit, as amended.² The

¹ At the hearing, the parties jointly moved to amend the petition to reflect that the correct name of the Employer is as reflected above. The parties' joint motion is hereby granted.

² At the hearing, Petitioner moved to amend paragraph 5b of the petition as follows:

Included: All full-time and regular part-time Banquet Servers, Bakers, Bar/Beverage Porters, Bartenders, Banquet Bartenders, Banquet Porters, Beverage Servers, Bus Persons, Cooks, Cooks Helpers, Food Servers, Assistant Food Servers, Guest Room Attendants, Host/Cashiers, House Persons, Kitchen Workers, Lead Porters, Lead Banquet Porters, Mini Bar Attendants, Porters, Room Runners, Service Bartenders, Sprinters, Status Board, Specialty Cooks, Stove Persons, Team Member Dining Room Attendants, Uniform Room Attendants, Utility Porters, VIP Bartenders, and VIP Bar Hosts employed by the Employer at its facility in Las Vegas, Nevada.

Excluded: All other employees employed by the Employer, including Banquet Captains, Bell Persons, Butlers, Valet Parkers, Housekeeping Supervisors, Gaming Employees (including, but not limited to Dealers, Slot Attendants, Cage, and Cashiers), Drivers, Front Desk Employees, Engineering and Maintenance Employees, Lifeguards, Spa & Salon workers, Temporary Pool Food & Beverage workers, Office Clerical Employees, Confidential Employees and all Guards, Managers and Supervisors as defined by the Act.

According to Petitioner, it moved to amend the petition to exclude "Banquet Captains" and the "Temporary Pool Food & Beverage workers" because it withdrew its request to represent employees occupying both excluded classifications. The Employer stipulated it did not object to Petitioner's motion to amend paragraph 5b of the petition. I grant Petitioner's unopposed motion to amend paragraph 5b of the petition as set forth above. However, as explained below, I have decided that it is appropriate for me to permit the approximately 14 individuals in the job classifications that Petitioner amended its petition to exclude to vote subject to challenge, so that the total number of

Employer maintains that the petition should be dismissed as premature because the Employer has not yet hired a substantial and representative complement of employees in the petitioned-for unit.

A hearing officer of the Board held a hearing in this matter, and the parties orally argued their respective positions prior to the close of the hearing. As explained below, based on the record and relevant legal authority, I find that the evidence establishes that the Employer employs a substantial and representative complement of employees in the petitioned-for unit, as amended, and that it is therefore appropriate for me to direct an election.

I. FACTS

A. History of the Employer's Operations

The Employer is engaged in operating the Palms Casino Resort (the Palms) in Las Vegas, Nevada, providing food, lodging, entertainment and gaming. The record evidence reflects that Palms opened around September 2001, and was acquired by Station Casinos LLC around October 1, 2016. The record reveals that the Palms is comprised of three buildings: Ivory Tower, Fantasy Tower, and Palms Place. Ivory Tower and Fantasy Tower are the Palms' main hotel and villas, connected as one continuous building. Palms Place is a condominium and small hotel tower connected to Ivory Tower and Fantasy Tower by a sky tube. The Palms is located off of the Las Vegas Strip and does not get as much foot traffic as Las Vegas Strip properties. The Employer estimates that the Palms currently has between 2,500 and 3,000 visitors per day.

B. The Employer's Operating Plans for the Palms

The Employer contends that since approximately October 2016, it has been undergoing upgrades and renovations to the Palms that it expects to continue through the third quarter of 2019. By the end of the third quarter of 2019, the Employer anticipates having hired approximately 273 new employees occupying positions it agrees would be appropriately included in the petitioned-for unit, as amended. At the hearing, the Employer's sole witness, its Food and Beverage Director, estimated that, of these new employees, approximately 200 would occupy food and beverage positions and approximately 73 would occupy housekeeping and internal maintenance positions.³

The record evidence indicates that the Employer forecasts hiring approximately 100 of these new employees during the second quarter of 2018, approximately 33 of these new employees during the third quarter of 2018, and approximately 29 of these new employees during the fourth quarter in 2018. The record further reveals that the Employer foresees hiring

employees in the petitioned-for unit plus employees being permitted to vote subject to challenge is approximately 845.

³ The Employer's Food and Beverage Director has been working for the Employer since October 1, 2016.

approximately 86 new employees during the first quarter of 2019 and approximately 25 new employees during the third quarter of 2019.⁴

Specifically, the Employer projects that by the end of 2019, the Palms will:

- open a new steakhouse called “Scotch 80” that will be operated by the Palms, adding approximately 71 new employees;
- open “Center Bar” and another casino floor bar, adding at least 25 new employees;
- add premium, ultra-luxury suites and approximately 60 new guestrooms, adding at least 36 new employees;
- upgrade and expand its casino space, adding approximately 27 new employees;
- revamp and expand its catering spaces, adding approximately 33 new employees;
- renovate its Team Member Dining Room;
- open a new spa & salon; and
- open a number of new restaurant, bar and club concepts.

The Employer expects that by the end of its expansion in 2019, it will have approximately 8,000 to 10,000 visitors per day.

C. Job Classifications Included in the Petitioned-For Unit

The record reveals that there are currently approximately 831 employees occupying approximately 31 job classifications included in the petitioned-for unit. According to the Employer, by the end of third quarter of 2019, it intends to add 5 new job classifications that would be included in the petitioned-for unit, including: Steakhouse Captains, VIP Beverage Attendants, Bakers 1, Bakers 2, and Bakers 3 (collectively, “new job classifications”). The Employer’s witness testified that it hired approximately 30 employees occupying these new job classifications around April 16, 2018. The Employer’s witness conceded that the employees who currently occupy (and employees who will occupy) these new job classifications are subject to the same and/or similar terms and conditions of employment and working conditions as the employees in the petitioned-for unit, as amended.

⁴ There is no record evidence reflecting the number of new employees the Employer expects to hire during the second quarter of 2019.

D. Job Classifications Excluded from the Petitioned-For Unit

The record reveals there are currently approximately 14 individuals occupying four job classifications excluded from the petitioned-for unit. One of these job classifications is Banquet Captain.⁵ The other three job classifications are Model Bar Porters, Model Bartenders, and Model Beverage Servers (collectively, “Pool Food & Beverage workers”).⁶ As indicated above, at the hearing, Petitioner moved to amend its petition to exclude “Banquet Captains” and “Temporary Pool Food & Beverage workers.” Petitioner simply stated that it was withdrawing its request to represent employees occupying both excluded classifications. The Employer stipulated that the petitioned-for unit, as amended, as appropriate.

In the Employer’s position statement, it argues that Banquet Captains “assign and responsibly direct the work of bargaining team members” and therefore are “statutory supervisors” who “must be excluded from the unit.” However, the record does not contain any actual evidence to support the Employer’s assertion that Banquet Captains possess such supervisory authority, or its legal conclusion that Banquet Captains are therefore supervisors under Section 2(11) of the Act.

Likewise, in the Employer’s position statement, it argues that its Pool Food & Beverage workers are “temporary employees” whose “employment will terminate in late October 2018, with the closure of the pool.” The Employer further asserts that its Pool Food & Beverage workers are “free to re-apply for employment” but they are “not placed on a layoff/recall list that would suggest any expectation of continued employment.” However, there is no record evidence to support the Employer’s assertions or its legal conclusion that its Pool Food & Beverage workers are, in fact, temporary employees.

E. The Complement of Employees Currently Employed in Job Classifications Included in the Petitioned-For Unit

The record evidence establishes that the Employer currently employs a total of approximately 831 employees in the petitioned-for unit, as amended. If the Banquet Captains and Pool & Beverage workers were also included in the unit, the Employer would currently employ a total of approximately 845 employees in the unit. The record reveals that the Employer anticipates hiring approximately 273 new employees who will occupy positions included in the petitioned-for unit, as amended. Based on these estimates provided by the Employer, the Employer currently employs more than 30 percent of the eventual employee complement that will comprise the unit.

Further, the record evidence shows that the Employer currently employs employees in a total of approximately 35 job classifications in the petitioned-for unit, as amended. If Banquet Captains and Pool & Beverage workers were also included in the unit, the Employer would currently employ employees in a total of approximately 39 job classifications in the unit. The

⁵ There is only one employee in this classification

⁶ There are two Model Bar Porters, four Model Bartenders, and seven Model Beverage Servers.

record reveals the Employer plans to add approximately 5 new job classifications by the end of 2019. Based on these estimates provided by the Employer, the Employer currently employs employees in more than 50 percent of the anticipated job classifications.

II. ANALYSIS

A. Relevant Legal Authority

In assessing whether a petition should be dismissed as premature because an employer has not yet hired a substantial and representative complement of employees in the petitioned-for unit, the Board assesses whether “the present work complement” is “substantial and representative of the ultimate complement as projected both as to the number of employees and the number and kind of classifications.” *MJM Studios*, 336 NLRB 1255, 1256 (2001), citing *Douglas Motors Corp.*, 128 NLRB 307, 308 (1960). This policy seeks to avoid depriving current employees of the right to select or reject a bargaining representative while not imposing a bargaining representative on a large number of employees hired in the near future based on the vote of a few currently employed individuals. *Toto Industries (Atlanta)*, 323 NLRB 645 (1997).

The Board generally finds an existing complement of employees substantial and representative when at least 30 percent of the eventual employee complement is employed in 50 percent of the anticipated job classifications. *Shares, Inc.*, 343 NLRB 455, 455 fn. 2 (2004); *Yellowstone International Mailing*, 332 NLRB 386 (2000); *Custom Deliveries*, 315 NLRB 1018, 1019 fn. 8 (1994). However, the Board considers a variety of factors, including the size of the present work force at the time of the hearing, the size of the employee complement eligible to vote, the size of the expected ultimate employee complement, the time expected to elapse before a full work force is present, the time and size of projected interim hiring increases before reaching a full complement, the number of job classifications requiring different skills that are currently filled and that are expected to be filled when the ultimate complement is reached, and the nature of the industry. *Toto Industries (Atlanta)*, 323 NLRB 645. A planned expansion is only pertinent to the extent that it occurs within the petitioned-for bargaining unit, assuming it is a separate appropriate unit. *Yellowstone International Mailing*, 332 NLRB 386; *Bekaert Steel Wire Corp.*, 189 NLRB 561, 561 (1971). Mere speculation as to the expansion of future operations is not sufficient to warrant dismissing a petition. *Gerlach Meat Co.*, 192 NLRB 559 (1971); *Bekaert Steel Wire Corp.*, 189 NLRB at 561; *KeyResearch & Development Co.*, 176 NLRB 134 (1969); *Meramec Mining Co.*, 134 NLRB 1675, 1679-80 (1962); *General Engineering, Inc.*, 123 NLRB 586, 589 (1959).

B. Application

Applying the standards set forth above, I find that the evidence establishes that the Employer employs a substantial and representative complement of employees both in the petitioned-for unit, as amended, and in a unit including both employees in the petitioned-for unit, as amended, and the individuals being permitted to vote subject to challenge, and that it is therefore appropriate for me to direct an election.

As set forth above, based on estimates provided in the record, the Employer currently employs more than 30 percent of the eventual employee complement. Further, based on estimates provided in the record, the Employer currently employs employees in more than 50 percent of the anticipated job classifications. I therefore find that the Employer employs a substantial and representative complement of employees.

C. The Banquet Captains and Pool Food & Beverage Workers Should Be Permitted to Vote Subject to Challenge.

Sections 11187.2 and 11189(f) of the NLRB Casehandling Manual (Part Two) Representation Proceedings (January 2017) provide the following dictates regarding prehearing stipulations:

11187.2 Prehearing Preparation of Stipulations

* * *

Contents of Stipulations: Care should be taken that the contents of stipulations are not so conclusory that the regional director or the Board might hesitate or be unable to adopt and follow them without “primary” foundation. For example, a stipulation that the Agency has jurisdiction over the parties is of no use without a recital of supporting commerce facts.

11189 Checklist

* * *

(f) Off the record, possibilities of stipulations not already obtained as to commerce, labor organization, question concerning representation, bargaining history, composition of the bargaining unit, seasonality, etc., and any other issues that may not be in serious dispute should be further explored. If attained, factual agreements should be incorporated into stipulations and put on the record; it is unnecessary to receive, as exhibits, copies of correspondence or records if a factual stipulation gives all necessary information. Sec. 11187.2 discusses the care that should be taken with regard to the contents of stipulations and the joinder thereto of parties.

Based upon this guidance, I am unable to adopt the parties’ stipulation to exclude “Banquet Captains” and “Temporary Pool Food & Beverage workers” from the petitioned-for unit, without the necessary “primary” foundation to support the parties’ stipulation. As stated above, the record lacks any actual evidence to support the Employer’s assertion that Banquet Captains are supervisors under Section 2(11) of the Act. The burden of establishing supervisory status rests on the party asserting that status, *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–712 (2001), and the Board has a duty not to construe the statutory language too broadly because the individual found to be a supervisor is denied the rights protected under the Act. See *St. Francis Medical Center-West*, 323 NLRB 1046, 1047 (1997); *Hydro Conduit Corp.*, 254 NLR 433, 437 (1981).

Similarly, there is no record evidence to support the Employer's assertion that its Pool Food & Beverage workers are temporary employees. The test for determining the eligibility of individuals designated as temporary employees is whether they have an uncertain tenure. *Marian Medical Center*, 339 NLRB 127 (2003). If the tenure of the disputed individuals is indefinite or uncertain and they are otherwise eligible, they are permitted to vote. *Personal Products Corp.*, 114 NLRB 959, 960 (1955); *Lloyd A. Fry Roofing Co.*, 121 NLRB 1433, 1438 (1958); *United States Aluminum Corp.*, 305 NLRB 719 (1991); *NLRB v. New England Lithographic Co.*, 589 F.2d 29, 32 (1st Cir. 1978). Since there is no record evidence for me to determine whether Banquet Captains or Pool Food & Beverage workers should appropriately be included in or excluded from the petitioned-for unit, I direct that the Banquet Captains and the Pool Food & Beverage workers be permitted to vote subject to challenge.

III. CONCLUSION

For the foregoing reasons, I conclude that the evidence establishes that the Employer has hired a substantial and representative complement of employees in the petitioned-for unit, as amended, and that it is therefore appropriate for me to direct an election. Based upon the entire record in this matter, including the parties' stipulations at hearing, and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.⁷
3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:⁸

⁷ I find, based on the stipulations of the parties and the record evidence, that the Employer, FP Holdings, L.P., d/b/a Palms Casino Resort, a Nevada partnership with an office and place of business in Las Vegas, Nevada, is engaged in operating a hotel and casino providing food, lodging, entertainment and gaming. During the 12-month period ending April 6, 2018, the Employer, in conducting its business operations described above, purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the State of Nevada. During the 12-month period ending April 6, 2018, the Employer derived gross revenues in excess of \$500,000.

⁸ At hearing, the parties stipulated that the petitioned-for unit, as amended, constituted an appropriate unit for collective bargaining.

Included: All full-time and regular part-time Banquet Servers, Bakers, Bar/Beverage Porters, Bartenders, Banquet Bartenders, Banquet Porters, Beverage Servers, Bus Persons, Cooks, Cooks Helpers, Food Servers, Assistant Food Servers, Guest Room Attendants, Host/Cashiers, House Persons, Kitchen Workers, Lead Porters, Lead Banquet Porters, Mini Bar Attendants, Porters, Room Runners, Service Bartenders, Sprinters, Status Board, Specialty Cooks, Stove Persons, Team Member Dining Room Attendants, Uniform Room Attendants, Utility Porters, VIP Bartenders, and VIP Bar Hosts employed by the Employer at its facility in Las Vegas, Nevada.

Excluded: All other employees employed by the Employer, including Bell Persons, Butlers, Valet Parkers, Housekeeping Supervisors, Gaming Employees (including, but not limited to Dealers, Slot Attendants, Cage, and Cashiers), Drivers, Front Desk Employees, Engineering and Maintenance Employees, Lifeguards, Spa & Salon workers, Office Clerical Employees, Confidential Employees and all Guards, Managers and Supervisors as defined by the Act.

Others Permitted to Vote: The Regional Director has directed that Banquet Captains, Model Bar Porters, Model Bartenders, and Model Beverage Servers may vote in the election but their ballots will be challenged since their eligibility has not been resolved. No decision has been made regarding whether the individuals in these classifications or groups are included in, or excluded from, the bargaining unit. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS a/w UNITE HERE INTERNATIONAL UNION.

A. Election Details

Following the hearing in this matter, the parties agreed and I direct that the election will be held on Friday, April 27, 2018 and Saturday, April 28, 2018, from 6:00 a.m. to 9:00 a.m., from 11:00 a.m. to 2:00 p.m., and from 4:00 p.m. to 7:00 p.m., at the Grand Ballroom on the second floor of the Fantasy Tower at the Employer's facility located at 4321 W. Flamingo Road, Las Vegas, Nevada.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **April 8, 2018**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the unit who have

worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election.⁹

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Also eligible to vote using the Board's challenged ballot procedure are those individuals employed in the classifications whose eligibility remains unresolved as specified above and in the Notice of Election.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Wednesday, April 25, 2018**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be

⁹ The Employer contends that certain catering employees occupying positions that are included in the petitioned-for unit, are ineligible to vote under the *Davison-Paxon* standard because each "has not averaged 4 hours or more per week for the last quarter prior to the eligibility date." *Davison-Paxon Co.*, 185 N.L.R.B. 21, 24 (1970). The record reflects that there are approximately 47 employees the Employer asserts occupy such positions, including Banquet Servers, Banquet Bartenders, Banquet Porters, and Lead Banquet Porters. At the hearing, the parties were unable to reach a stipulation agreeing that employees occupying such positions would vote subject to challenge. The hearing officer therefore deferred this issue to post-election proceedings, if necessary. As a reminder, the Employer's election observer(s) is/are free to challenge any such voters on this basis at the election, as appropriate.

used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.¹⁰

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting, and likewise shall be estopped from objecting to the non-distribution of notices if it is responsible for the non-distribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not

¹⁰ Following the hearing in this matter, Petitioner informed the Regional Office in writing that, in order to proceed to an election in this case at an earlier date, it wished to waive its right to file objections to the election based on the fact that it did not have the voter list for the full 10 days before the election, contingent upon its having the voter list for zero (0) days before the start of the election.

precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated at Phoenix, Arizona, this 23rd day of April, 2018.

/s/ Cornele A. Overstreet
Cornele A. Overstreet, Regional Director